United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

998

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24029

UNITED STATES OF AMERICA

v.

ROBERT WORTHEY

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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TABLE OF CASES

* Case principally relied upon.

ISSUES PRESENTED FOR REVIEW

1. The issue is whether or not the Court erred in allowing the case to be presented to the jury when the whole government's case was based upon circumstantial inferences.

2. The issue is whether or not the Court was in error when it submitted to the jury the "modified Allen Charge", before deliberation when the Court made no indication to counsel that this charge was to be given.

3. The issue is whether or not the Court erred when it stated in the presence of the jury "this will not help him", when the defendent was testifying in his behalf.

4. The issue is whether or not the trial Court committed reversable error in instructing the jury on the offenses of second degree murder and manslaughter, specifically on the elements of malice and remarks as to the elements of the crime to be proved.

5. The issue is whether or not the trial court committed error in allowing a witness who saw shadows and heard sounds draw improper inferences to the jury, time and time again over the objections of defense counsel; and whether the trial judge in summing up his testimony and saying "he is competent to testify to this", led weight to mere speculation to the jury.

6. The issue is whether or not the court erred in allowing the District Attorney to state, over objection, in his opening statement, "that the government is going to show as a fact that this woman was beaten to death by the defendant", when the government knew that its whole case depended upon inferences.

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*This matter is before this Court in the first instance. It has not been to this Court previously.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24029

UNITED STATES OF AMERICA

v.

ROBERT WORTHEY

Appellant

REFERENCES TO RULINGS

Denial of oral request to tell the jury the District Attorney's statement to the jury in his opening statement was improper T/44-44. Denial of motion of acquittal at the end of the government's case T/166. Denial of motion of acquittal at the end of the entire case T/203-207. Denial of defense counsel's request to instruct the jury in regard to degree of drunkenness specifically in regard to malice T/222, and intent of second degree murder and manslaughter.

STATEMENT OF THE CASE

Appellant, Robert Worthey, was indicted by a Grand Jury for the crime of Murder in the Second Degree (Title 22 2403 D. C. Code). Apellant was tried before a jury in the United States District Court for the District of Columbia and convicted of the offense of Second Degree Murder. He was sentenced by the Court to a term of imprisonment of from twenty years to life. Appellant noted an appeal from this conviction and the case is properly before this Court.

Witnesses called by the Government testified as follows:

Edna McLean testified she lived at 312 6th Street N. E., Washington, D. C. on the first floor. T/46. She identifed the defendant as Mr. Pete. That on May 1, 1969 he lived at the same address upstairs above her and there were windows in front of his rooms. T/43. Further she testified she knew the deceased, Aletha Jackson for over a period of a year. That on May 31, 1969 she came to visit her, sometimes before 12:00 o'clock a. m. At the time she arrived her children and her husband, Jack were present. The deceased said she was tired and it was too noisy in the street at her place. She lay down in Mrs. McLean's front room but came into the front room next to the kitchen. That when the deceased came in she brought some beer with her and that later on about 4 or 5 p. m. she and the deceased went to the Safeway store and stopped by the whiskey store. T/50. That before they went to the store, the deceased went upstairs, and she didn't know whether anyone was up there or not. When she came down, she had a 3 inch

scar on the side of her face and blood on her dress. T/52. That she begged the deceased not to go back upstairs, but she went anyway and that she never did come back down. She stated she heard her scream at about 10 p. m. but that she was drinking and went back to sleep. T/53. And that she didn't know if there was anybody up there with her.

On cross-examination, Mrs. McLean stated she knew the deceased and that she had a drinking problem T/55, and drank any time of the day usually gin and whiskey. Mrs. McLean stated she had been drinking all day before the deceased arrived. That on the way from the Safeway she and the deceased bought a half pint of Old Taylor Whiskey which they drank. T/57. That her husband was drinking wine along with her. That when she and her husband went to bed both of them were feeling no pain. T/59. That when she saw the deceased with blood on her face she did not seem disturbed nor did she say that someone hit me. T/61.

Dr. Linwood Rayford, D. C. Coroner, stated he saw Aletha Jackson 65 years of age, deceased at approximately 10 a. m., Sunday June 1, 1969 at 312 6th Street, N. E. and pronounced her dead at that time. That later an autopsy was performed; that she was a negro female, 5 feet tall, 148 pounds, obese, that there were bruises on both thighs, both arms, the right eye and her nose was broken, broken fingernails, bruises on the scalp, back of left arm and extensive bruises over the buttocks; that an internal examination showed she had hardening of the arteries, lungs full of blood. The heart was stuck to its covering,

that the valve leading to the aorta was fused and tight that she had pericarditis cartitis. T/63, and that she was hemorrhaging into the neck a fraction. The blood alcohol level of the deceased was .24, twice the normal level of a person who would be charged with driving under the influence. He testified this would severely impair an individual's walking ability. The official cause of death was a broken neck. T/64. That other injuries compatible of death was a fractured vertebra, upper ones in the neck, 4th and 5th. Also the decedent with .24 alcohol, and a broken nose with blood running from the nose into the lung would be lethal.

On cross-examination, Dr. Rayford testified that he had no way of knowing the amount of alcohol the deceased body burned up prior to her death. He testified she would be susceptible to falls, running into objects. T/69. Dr. Rayford testified he could not state the exact cause of death. That he was merely giving an opinion; that she died either from a broken neck or from a broken nose which filled up the cavity of the lungs with blood. T/70.

Agent Fred Wallace of the FBI testified as follows:
That he was assigned to Hairs and Fibers Unit of the FBI laboratory in Washington, D. C. and that he conducted microscopic examinations and comparisons of hairs and fibers. T/73. He identified pill boxes presented by the government containing several head hairs ranging from grey to white of a negroid origin. T/77. He identified another pill box reported containing known hairs from the deceased and mounted them

on two glass microscope slides and found that the hairs in these pill-boxes microscopically matched the head hairs from the deceased and originated either from her or from some other person of negroid origin whose hairs exhibited exactley the same microscopic characteristics. T/79.

On cross-examination, he stated he was given 12 other items to examine and the government stipulated that Mr. Wallace was not able to compare the hairs successfully at the bench conference. T/82. But as to appellants recollection, this stipulation was never stated to the jury.

Jack McLean was called by the government who testified that he lived at 312 6th Street, N. E., Washington, D. C. with his wife Edna McLean for 18 months on the first floor. That on May 31, 1969 Mr. Worthey lived upstairs in the front room. That he saw Aletha Jackson, the deceased on May 31, 1969 at about noontime. T/89.

At about 3 or 4 p. m. he and his wife and the deceased were in his apartment drinking together. That Mr. Worthey teased the deceased when he came there-that he may have been kidding or could have meant it; that he said "If you don't give me a little bit, I am going to kill you". but that he always teased her. T/90. Between 9 and 11 p. m. that evening, he heard sounds like a slap and heard the deceased scream; "always when she laughs she screams". Later he went upstairs and found Mrs. Jackson, the deceased, laying beside the bed on the floor, so he figured she was drunk because she had been drinking. T/93. That Mr. Worthey was walking around the room doing nothing. T/94. Later he went back upstairs to wake her up and bring her back to his apart-

ment; when he saw her laying flat on her back with her face toward the door and saw blood coming from her nose; he told his wife he figured she had been hemorrhaged from drinking. T/ 95. And at this time he did not see the defendant. T/96. Upon reading a previous statement to the police given to him by the district attorney, he then stated that he saw the defendant sitting at the top steps stairway going up to his room. He further testified he had been drinking wine during the day. T/97.

On cross-examination, Mr. McLean testified he met Mrs. Jackson, the deceased when he was sent to the hospital for Alcoholics some 12 or 18 months ago. When asked about the statement made by the defendant "If you don't give me a little bit, I will kill you" he stated-yes they teased each other that way. T/101. And that he had heard that before and that the deceased did not seemed to be disturbed by this statement. T/102. He further stated that when the deceased laughs which she did all the time, she screams at the end of her laugh. T/102. That he knew too, that the police came to his house that night that they looked at the deceased and left. T/104. Later he said he could not recall what time the police came to his apartment and looked at Mrs. Jackson, the deceased.

Rueben Kale was called by the government and testified as follows: That he lived at 1725 29th Street, S. E., Washington, D. C. and worked at Fort Belvoir, Virginia. On May 31, 1969 he was at 600 Maryland Avenue, Washington, D. C. right across the street from 312 6th St. N. W., Washington, D. C. approximately 60 feet. T/108. That between

9 and 11 p. m. he was sitting out there on the wall and heard a lady scream and looked up in the window and saw this man with a long object from a window second floor front. That he heard a lady scream but could not see her but the sound was like you hit something with a stick or something; that he hollered up and told him if he kept on beating he was going to call the police. T/110. Counsel for defense promptly objected to this testimony and the Court said "The jury understands that perfectly well, just as you and I do, he has testified that he heard what he identified as a female screaming and he looked up and he saw in the second floor front someone with a long object swinging the long object with a thudding sound and he heard this screaming. Now, he doesn't know and can't testify as to where that long object was landing or any opinion or thoughts on his part at to whether it was an inanimate object being hit, this is entirely speculating on his part and the jury understands that it is. He is just a witness that just happened to be across the street and he heard and saw certain things happening and he is perfectly competent to testify as to that". All of this was stated to the jury by the Court. T/111. The witness kept saying "do you mean when he stopped beating her?" and the district attorney answered, "yes, how long". The Court then stated "You don't know whether he was beating anybody or beating a rug, you mean when the beating stopped".

The Court then said "You don't know whether he was hitting on her or not". <u>He was hitting on something.</u> I think we all understand each

other. The jury is not being deceived and neither is anybody else. The jury knows perfectly well this man did not see the deceased and he did not see who-he doesn't know who the person was that was striking with the long object and he doesn't know what he was doing with the long object. All he knows is that a man was holding a long object, that he struck with a thudding sound, that while this was going there was something that sounded like a woman screaming. That is all he knows". T/113.

The witness further testified that after he saw this, he called the precinct but could not remember the correct time. That the police responded to his call and went into the house to check his complaint then left and came over and talked to him. He stated that after the police left he again heard the screams and stated he beat her. T/114.

An attempt to impeach this witness with his drunk record by the defense counsel was denied by the Court. T/117.

On cross-examination, the witness stated he was there that night visiting his brother-in-law and they were drinking beer; 2 or 3 six packs; that there were six or seven people there. That he did not drink because of diabetes and that he left about 2:30 or 3:00 a. m. in the morning. That while he was there he did not see the police bring anybody out of the house or arrest anyone after he had made the complaint to the police. T/21.

That he could see a light in the hallway, the window was open and the shade was up and he could not recognize anybody. T/124. He stated he did not testify before the Grand jury and that he had talked to a policeman

three weeks before he talked to the District Attorney. T/127.

The government then called Richard Lewis Chandler who stated he lived at 4125 Hunt Place, N. E., Washington, D. C. that on May 31, 1969 he was with Carolyn Worthey at her mother's house and stayed there until about 2 p. m. That he knew the defendant and saw him on June 1, 1969 on a corner at 6th St. N. E. at about 5:30 to 6:00 a.m. that he called me and I parked the car and went with him upstairs and saw a lady lying on the floor in his room. He told me he thought she was dead. I looked at her; told him she was dead. T/132. We then put the body on the bed. The defendant then asked me to put the body in the car and take her to Bowie. That he denied this request and went around the corner to tell Carolyn's brother who returned with him. T/133. That Carolyn was asleep in the car, that he woke her up and told her what was happening. The defendant asked him twice if he would take the body out of the house. He also asked Carolyn and I to say he was at the party with us. The witness further stated he saw red spots on the defendant's shirt. T/134. He stated he noticed bruises on the deceased legs and fingers that had been mashed. T/134.

On cross-examination, the witness stated he had been to a birthday party where whiskey, gin and beer was being consumed. That he arrived about 10 and left at 2:00 p. m. and while there he had about 8 drinks of 90 proof gin. T/137. He stated that when he saw the defendant, he appeared to have been drinking alot and that he did not say he did anything to the deceased; and that he was scared when he asked him to take

the body out of the house T//39. He further stated the defendant asked him to call the police and that after the police came he did not go back upstairs. That the daughter of the deceased called the police and that he parked the car and the police took him and Carolyn to headquarters. T/142.

Carolyn Worthey then testified as follows: That she was the defendant's daughter and stated she saw her father on June 1, 1969 about 5 a.m. in his apartment. T/142. That she was there with Richard and saw a woman on the bed. That her father told her to call the police. He asked her to tell the police that he had been with Richard and I all night long. T/144.

On cross-examination, Carolyn stated her father was pretty high that morning. She stated she and her boyfriend went to a party at her sister-in-law's mother's; that they arrived at about 9 o'clock and they left about 12:30 or 1:00 a.m. At the party, she stated she had been drinking scotch straight, four drinks. T/147. When she left and started back home to her father's house, they decided to go to another party in Northeast Washington to a friend of her's and that they stayed there half an hour. T/149. That they arrived at her father's house at about 8 to 8:30 that morning. T/150.

Robert Crist, Detective, assigned to the Homicide Unit, Metropolitian Police was called by the Government and he testified that he was in charge of the investigation of the death of the deceased and that he responded to the scene on June 1, 1969 at about 8:35 a. m. That he went to 312 6th Street, N. E. and found the deceased lying on a bed in the second front bedroom. T/156. He described the room as located on the

south side of the building, as you go into the room there was a dresser between the door and the bed, next to the dresser is a small scatter rug, next to the rug is a double bed, where the deceased was lying on the left side of the bed. That in the room was several beer, wine and gin bottles, scattered among the floor and trash cans. That the body was lying on her back, face up. There were numerous bruises all over both thighs. T/157. Her left hand thumb, second and third fingernails were broken off. Next to the fingernails on the second and third finger there were small cuts. The little finger on the right hand had a small cut and there were dried blood on both hands. The deceased was clad in a black and white checked dress which was worn backwards inside out, partially zipped down the front which exposed a white bra. The deceased had no underclothing on. T/158. The officer identified hair strands, a baseball bat and a piece of bannister recovered from the bedroom. He stated he turned these items over,to the FBI for examination and comparison. T/161.

It was stipulated that the baseball bat and the banister rail had blood stains on them but was undetermined as to whose blood was on these items. T/162.

The government then asked that the jury view its exhibits and the defense counsel requested the court to tell the jury that the writing on these exhibits is not to be considered as evidence since it could be an opinion of the police officer or the FBI. T/163. To this the court agreed but failed to tell the jury to disregard these writings. T/164. After this the government rested. T/164.

Motion for judgment of acquittal on behalf of the defendant was made by the defense counsel in that the entire government's case was built on inferences built upon further inferences and no factual situation was presented here upon which a jury could decide without speculation. T/166. This motion was denied by the Court.

The defendant, Robert Worthey took the stand and testified as follows: that he would be 66 years old the 13th day of next month and did not finish the third grade and went to work after he dropped out of school in Greensburo, N. C. That he had been a resident of the District of Columbia since 1928, that he was not working now but was living on social security, but that when he worked he drove heavy duty trucks for a living. T/168. He stated he was living on May 31, 1969 at 312 6th St. N. E., Washington, D. C. that he lived there in a second floor front room. After he returned from cashing his check and buying a fifth of gin, he met the deceased and Mr. McLean who asked him for a drink and that he and his wife and the deceased came up to his room for a drink. T/170. And that they came back and forth practically all day. That he went out to get whiskey about 2:30 or 3:00 p. m. and again that night at 8:30 or a quarter to nine that Saturday night.

He stated that Mrs. McLean told the deceased to quit mixing her drinks of gin and wine and told her she had no money to get her out of the hospital stating "you know you have spells". T/171. That the two people who had the apartment downstairs left about 10 minutes to one. That he had no cigarettes and he tried to awaken the deceased to

go with him but she would not awake so he went to a filling station at 4th and C Streets N. E. for cigarettes and an orange soda. When he came back he found the deceased lying on the bed a foot and a half from the floor with blood on her chest. T/172.

He stated that the police had arrived at his house at 5:30 or 6:00 o'clock in the evening and the police said someone called them and said there was a fight here, that he told them there was nothing but a drunk woman laying there, that the police looked at her and turned around and walked out. T/172. That he attempted to find a man named Joe who worked at the filling station who saw him that night and they told him that he did not work there anymore. T/173. The defendant said that when he came back from the filling station he found the deceased lying by the door with blood-so he ran downstairs and called Mrs. McLean to try to get them to help him put her on the bed. He told them she had a spell and that I took salt and rubbed it in the palm of her hand but she did not come around; so shortly after that my daughter and her boy friend came up. T/174. He further stated he purchased two orange sodas and a package of camel cigarettes at the gas station and that when the police arrived one of the orange sodas was sitting in the window. He stated that the baseball bat had been in his room as far as he knew for the past two or three years that it sat behind the door. Defendant stated he never hit the deceased with the bat or any other object. T/175.

Defendant said he put the deceased on the bed by himself that she

had been drinking all day. Mrs. McLean told her at the beginning that she was drunk then and did not need any gin. That his daughter and her boyfriend came in about 5 to 5:15 early that morning. T/174. That she told them the lady had a seizure and did not come around, that he rubbed salt on her hand. The box of salt was sitting on the edge of the bed when the police arrived. The boy friend of his daughter said "I should have called an ambulance"-. He said he didn't because he didn't know what was wrong with her so he told them "Someone get out of here and call the police or ambulance to come here". That the daughter's boyfriend told the daughter to call. He denied that he had told the boy friend of the daughter to help him move the deceased out of the house. He further stated that he and the boyfriend did not get along as he was selling whiskey and that he had got after him for this. T/177.

He denied that he had told the boyfriend to tell the police where he had been during the night. He was asked about the remark "if she didn't do anything he was going to kill her" and he denied this. T/178.

That while he was in the room, he was either watching television or looking out the window and that the deceased was nursing the gin bottle and looking out the window and watching television.

That the deceased when she laughed loud she sounded like someone screaming and that she was sitting by the window in a chair when he left to go to the filling station. That this was the first time she had ever been in his room in her life. T/179. He denied that he had beat her with any object in any way. T/180. That he did not see the banister broken

when he came back into the room but he did see when the police arrived. That the bat was sitting behind the door where it stayed all the time. That when he picked up the deceased he got blood on his shoulder and his shirt sleeve. T/181.

On cross-examination, the defendant stated the deceased was lying on the floor when the police came and that she was not bleeding; he told the police she was drunk. T/182. That when he returned from the filling station, he found the deceased on the floor at about 1:45 in the morning. T/183. That when Mr. and Mrs. McLean and the deceased came to his room a little after dark and stayed until after midnight, drinking and watching television. T/185. He said he heard the McLeans state they were not in his room until after midnight but that they were there with the deceased. T/188. That when he found the deceased she was bleeding from the mouth and had blood all down her chest. He went downstairs to Mr. McLean's room, knocked, received no answer and went back upstairs put her on the bed and rubbed salt in the palm of her hand, T/191, and wiped her face with a towel. T/192. He denied he asked Mr. Chandler to say he was with them that evening and also that he asked him to take the body out to the country. He stated the only thing that he asked him was to call either the police or the ambulance to get the woman out of there. T/193. He further stated he did not know where she got the bruises on her buttocks, abrasions on her forehead or a broken nose. T/195.

On redirect examination, the defendant said that "all of us had been drinking that morning until 12:00 o'clock that night". T/196.

Julius Cochran, Metropolitan policeman was called by the defense who testified as follows: that he had been a policeman for 3 years and was on duty from 4 to 12 p. m. on May 31, 1969. That he received a call to go to 312 6th Street, N. E. Washington, D. C. and upon arrival there he talked to Ruben Kale in a house across the street from that address. T/197. He stated Ruben Kale told he observed a fight in the house across the street in the upstairs front room. He could see a gentleman up there striking something and he heard a woman screaming the whole time. That he went across the street to investigate at 312 and went upstairs and observed a woman lying on the bed on her stomach with her dress pulled up around her waist and a gentleman standing in the room. He could not identify the defendant as the one who was in the room but said both parties were intoxicated. That the room was filthy, empty bottles, bed without linen, beer cans and trash on the floor. That he did not observe any blood on the defendant or the lady lying on the bed. T/200.

On cross-examination, the officer said he arrived there at approximately 11:30 p. m. after receiving a radio run for a fight call. That the address was given to him by Mr. Kale. He stated he went into the room about three feet and did not physically check the body. That there was movement in the legs of the deceased and that he saw no injuries on the body. T/202. After this testimony the defense rested its case and renewed its motion for judgment of acquittal. T/203-207. This motion was denied by the Court who let the case go to the Jury.

ARGUMENT

I. Presenting the case to the jury when the whole government's case was based upon circumstantial inferences.

Counsel for the defense contended in his motion for judgment of acquittal, that the government's case depended upon mere circumstances based on other circumstances rather than facts.

"A conviction cannot rest upon mere possibilities. Circumstantial evidence is adequate to prove an essential element--only when the only possible inference to be derived from it is guilt". The government must negate reasonable inferences which are consistent with guilt. Malloy v. U. S., D. C. App. 246 A. 2d 781-783 (1968).

In the present case, the alcohol content of the deceased plus the susceptability to falls and running into objects was never negated by the government as to the cause of death of the deceased. Also other people were in the house who had access to the deceased and could have caused her death. None of the facts and exhibits presented by the government negated any of these reasonable inferences.

And in passing upon a motion for judgment of acquittal, particularly in a case depending upon circumstantial evidence, the trial judge must be careful to differentiate "between pure speculation and legitimate inferences from proven facts". Curley v. U. S. 81 U. S. App. D. C. 389-393, 160 F. 2d 229 (1947).

2. Modified "Allen" Charge

Toward the end of the charge to the jury the following was stated to the jury: Ladies and gentlemen, your verdict must be

the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree on the verdict. Your verdict must be unanimous. Although the verdict must be the verdict of each individual juror and not a mere acquiescence of your fellows, you should examine the questions submitted with candor and with proper regard and deference to the opinions of each other. You should listen to each other's arguments with a disposition to be convinced. If much the larger number juror's are for conviction, a dissenting juror should consider carefully whether his doubt is a reasonable one when it makes no impression on the minds of so many jurors, equally honest, equally intelligent with him or herself. On the other hand, if the majority are for acquittal the minority ought to ask themselves and carefully consider whether they might not reasonably doubt the correctness of their judgment which is not concurred in by the majority". Counsel for the defense objected to this instruction T/241 stating it takes away--(the right of an individual juror to decide the case with any potentially coercive influence) and indicating that the judge stepped off the bench before the attorney had an opportunity to object and also there was no indication that this charge was to be given by the Court. As this Court said in Clarence Johnson v. U. S. No. 23,163 P-13 decided June 19, 1970 speaking of the same modified "Allen" charge as given here, "the charge did have coercive impact" and counsel objected at the earliest possible time. In Sheppard v. Maxwell 384 U. S. 333 (1966), The Supreme Court held that the jury must be protected from all potentially coercive influences.

3. The Courts remark to the jury.

Appellant contends that the Court's remark "I don't think this helps any" while the defendant was testifying before the jury stating his defense was prejudical to the defendant in that such remark tends to indicate to the jury that the Court believed the defendant was guilty of the charge, and berated his testimony. T/180.

4. The Instructions to the Jury.

The Court in stating to the jury, the two elements the government needed to prove to convict for second degree murder stated "as to the first element, that the defendant inflected a wound or wounds from which the deceased died, "this needs no further explanation". The Court in stating that this needs no further explanation may have led the jury TO BELIEVE THE GOVERNMENT HAD PROVED "cause of death" and thus supplied one of the elements the government had to prove. Here the coroner testified he could not state the exact cause of death; that he was merely giving an opinion. T/70. That there were two causes; to wit: a broken neck and a broken nose. Also with a .24 alcohol in her system she would be very susceptible to falls and running into objects. T/69.

The Court in explaining to the jury, the definition of malice stated "Implied malice as such as can be inferred from the circumstances of the killing as for example, where the killing is caused by the intentional use of a fatal force without circumstance serving to justify or mitigate the act T/233. The impact of this instruction is that malice is implied where there is use of fatal force. This instruction was essentially the kind of instruction that was cited as error in the case of Green v. U. S. App. __. D. C. __, 405 F. 2d 1368. As the

Court pointed out in Green, supra, "manslaughter may be and often is the intentional commission of a wrongful act".

5. Allowing the witness to give improper inferences to the jury.

Appellant contends that the trial judge on allowing a witness who saw shadows and heard sounds draw improper inferences to the jury, that the defendant was beating the deceased. T/111-113. When the facts of the case showed that he called a policeman to investigate this alleged beating and the police found no evidence to back up his charges. The Court in summing up his testimony stated "he is competent to testify to this" led weight to mere speculation to the jury and prejudiced the appellant's case.

6. The District Attorney's Opening Statement

A defendant on trial for any criminal charge is entitled to a fair trial. One of the essential elements of a fair trial is that the District Attorney should be scrupulous in the statements that he makes in his opening or summation to the jury; that he should refer only to such facts as were or to be established by the evidence and may make fair comment thereon; that he should not appeal to the prejudices of the jury, or seek to inflame the jury by his remarks nor should he state his opinion of the innocence or guilt of the accused. People v. Vario, 257 App. Div. 975, 13 N. Y. 2d 41.

The obvious dangers in allowing such remarks are that the jury may take accepted unproven facts as true and be overly impressed with the office of the prosecutor. Berry v. Comm., 227 Ky. 528 13 S. W. 2d 521. It is the primary duty of the prosecutor to see that justice is done and

the rights of all are protected. Brady v. Maryland 373 U. S. 83, 83 S. Ct. 1194.

The prosecuter is stating that we would show as a fact that this woman was beaten to death by the defendant may have led the jury to believe the government had further evidence which they could not present. It is basic to the American system of Criminal law that an accused be tried and either convicted or acquitted upon the facts in evidence of his case.

CONCLUSION

In consideration of the premises herein, appeliant moves that his conviction be reveresed, and a new trial ordered.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,029

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT WORTHEY, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY.
United States Attorney.
JOHN A. TERRY,
JOHN S. RANSOM,
Assistant United States Attorneys.

Cr. No. 1871-69

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OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

1. Whether the trial court properly denied appellant's motion for judgment of acquittal.

2. Whether the trial court erred in giving an *Allen*-type instruction in its original charge to the jury.

3. Whether the trial court prejudiced appellant in his remarks in sustaining a Government objection to a question asked by appellant's counsel on direct examination of appellant.

4. Whether the trial court properly prevented a witness from giving conclusory testimony.

5. Whether the jury was properly instructed by the trial court on the elements of second-degree murder.

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* This case has not been previously before the Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,029

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT WORTHEY, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On August 19, 1970, appellant was indicted for second-degree murder (22 D.C. Code § 2403). After a trial on November 14 and November 17, 1969, before the Honorable John H. Pratt and a jury, appellant was found guilty as charged. On February 19, 1970, appellant was sentenced to a term of imprisonment of twenty years to life. This appeal followed.

On June 1, 1969, Aletha Jackson was found dead in a second-floor front bedroom at 312 6th Street, Northeast. An autopsy performed the same day revealed marked bruises on both thighs, broken fingernails on three of the fingers of one hand, small abrasions on two fingers of the same hand, a broken nose, marked bruises on both arms and the right eye, and bruises on the back of the head, back of the left arm and over the buttocks. An internal examination revealed her lungs filled with blood; a heart condition, pericarditis; a broken neck, *i.e.*, fractures of the fourth and fifth upper vertebrae in the neck; and a

blood alcohol level of .24 percent. The cause of death was determined to be the broken neck (Tr. 62–64).[1]

On May 31, 1969, the decedent had visited Mrs. Edna McLean in the morning. Mrs. McLean and her husband occupied the ground floor of the two-story row house at 312 6th Street, Northeast. The only other adult occupant of the building was appellant, who occupied the second-story front bedroom in which the body of the deceased was ultimately discovered. After Mrs. Jackson arrived, she and Mrs. McLean engaged in some drinking and later in the day went to the liquor store, where they purchased some alcoholic beverages. Prior to going to the liquor store, they were joined by appellant and Mr. McLean. During the period all four were drinking together in the McLeans' apartment, appellant told the decedent, "If you don't give me a little bit I am going to kill you" (Tr. 90). When she and Mrs. McLean returned from the liquor store, appellant had departed. Mrs. Jackson then went upstairs, where she remained for a period of time. Later she returned to the McLean apartment with a scar on her face and blood on her dress, but she stayed only a moment before returning upstairs (Tr. 51–52). That evening, after the McLeans had retired, Mrs. McLean heard Mrs. Jackson scream about 10:00 p.m., but she just "turned over and went back to sleep" (Tr. 53). During the same period of time, between 9:00 p.m. and 11:00 p.m., Mr. McLean heard a sound from upstairs which sounded "like a lick" followed by a scream from the decedent; however, Mr. McLean remarked that the decedent always screamed when she laughed (Tr. 93). Mr. McLean nevertheless went upstairs to ascertain if anything were wrong. The decedent was on the floor beside the bed, and appellant was "walking around the room" (Tr. 94). About one-half hour later Mr. McLean again went upstairs and saw the decedent lying on the bed with blood coming from her nose. Appellant was sitting at the top of the stairs (Tr. 95–96).

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[1] Dr. Linwood Rayford, Jr., pronounced the decedent dead and performed the autopsy (Tr. 62). A stipulation was agreed upon by counsel as to the identification of the deceased and to the chain of custody of the body (Tr. 3).

On May 31, 1969, Mr. Rueben Kale was attending a party at 600 Maryland Avenue, directly across the street from 312 6th Street. Sometime between the hours of 9:00 p.m. and 11:00 p.m. he was in front of the Maryland Avenue address when he observed through the open second-floor front window of 312 6th Street a man with a long object in his hand "beating down" and a "lady screaming" (Tr. 108–109). This occurred several times as he watched (Tr. 110). The beatings and the screams stopped for a period of time but commenced again, and at this point Mr. Kale called the police (Tr. 112–113).

The police arrived, and after a conversation with Mr. Kale they went to 312 6th Street and went up to the second-floor front bedroom.[2] After the police left, Mr. Kale again observed the man with the object beating down "several times" and the woman screaming. After the third time that the object struck, there were no more screams (Tr. 114). The object that Mr. Kale observed in the hands of the man was about two and one-half feet in length. The window and the shade were both up in the bedroom, and the bedroom area was illuminated by a light in the hallway which permitted viewing through to the hall (Tr. 123–124).

At approximately 5:30 a.m. on June 1, Mr. Richard Chandler and Carolyn Worthey, appellant's daughter, were in the vicinity of 6th Street, Northeast, when Mr. Chandler saw appellant on a corner (Tr. 130–131). At appellant's request Mr. Chandler and appellant's daughter accompanied appellant to his room (Tr. 132). Mr. Chandler observed a woman lying on the floor and assisted appellant in placing the body on the bed. Mr. Chandler told appellant that she was dead. Appellant requested that Mr. Chandler "put the body in the car and take her to Bowie" (Tr. 132–133), but Mr. Chandler refused to do so. After

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[2] Officer Julius Cochran was called as a defense witness and corroborated the conversation with Mr. Kale. Officer Cochran testified that he arrived at the scene at approximately 11:30 p.m. (Tr. 199, 201). After speaking with Mr. Kale, he went to appellant's room and observed "a woman lying on the bed on her stomach with her dress pulled up around her waist and another [*sic*] gentleman . . . standing in the room" (Tr. 199). The officer remained in the room only a brief period of time before departing (Tr. 114, 201).

again requesting that he take the body away and again being denied, appellant told Mr. Chandler and Miss Worthey to tell the police that he was with them that evening. Mr. Chandler stated that they could not do that. Mr. Chandler, during the course of his conversations with appellant, noted that red spots were visible on appellant's clothing (Tr. 134). Miss Worthey testified that she was with Mr. Chandler and observed the body in her father's apartment (Tr. 142–143). She related also that appellant had requested her to tell the police he had been with Mr. Chandler and her "all night long" (Tr. 144).

Detective Robert Crist of the Homicide Squad testified that he arrived at the scene at approximately 8:25 a.m. on June 1. Other police officers, Miss Worthey, Mr. Chandler and appellant were present. Detective Crist found the decedent lying face up on the bed and noticed the external markings and blood. He also observed that the decedent was partially unclothed (Tr. 156–158). Detective Crist identified a number of articles that he found on the scene, including a hair on a small wood chip, hair strands from the bedroom floor, hair samples removed from the decedent, a broken fingernail, a baseball bat, and pieces of a broken banister also found in the bedroom (Tr. 159–161).[3] Detective Crist further testified that all of the hair strands removed by him from the scene were sent to the Federal Bureau of Investigation Laboratory for analysis (Tr. 161). Agent Frederick Wallace of the F.B.I. testified that the hair fibers of unknown origin submitted by the police matched the hair samples removed from the decedent and were either her hair or the hair of someone with the same characteristics (Tr. 79). At the end of the testimony for the Government, the items identified as exhibits were admitted into evidence with no objection from appellant (Tr. 162). The Government thereafter rested its case (Tr. 163). Appellant moved for a judgment of acquittal, but the motion was denied (Tr. 166).

Appellant took the stand in his own behalf. He testified that he occupied the room in which the decedent had been found and had resided there some five months (Tr. 169). On May 31, 1969,

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[3] A stipulation was entered that stains apparent on the baseball bat and the banister pieces were human blood stains (Tr. 162).

the decedent, Mrs. McLean and Mr. McLean spent the day with appellant drinking, principally in his room but often downstairs in the McLean's apartment (Tr. 170–171). At about 12:50 a.m. on June 1, 1969, the McLeans left appellant's room and went downstairs. Appellant went to a filling station to get some cigarettes and some orange soda (Tr. 172). When he returned from the station, he "found this lady laying on the bed about a foot and a half from the floor with blood on her chest" (Tr. 172). He testified that the police had come to his apartment, but he said that this was about 5:30 or 6:00 p.m. and that they left after being told nothing was going on (Tr. 172). Appellant denied committing the offense and related that he thought the decedent had simply had an epileptic spell (Tr. 175). Appellant denied that he told Mr. Chandler to move the body out of the house and stated that Chandler had a grudge against him (Tr. 177). He also denied making any statement to his daughter (Tr. 178).

On cross-examination appellant contradicted the testimony of the McLeans, stating that they were upstairs in his apartment throughout the evening (Tr. 187–189). He further denied that any beating had occurred during the evening (Tr. 189) and that the police had come to his apartment at any time after 6:00 p.m. (Tr. 193). On redirect examination appellant testified that he had been drinking quite a bit during the day (Tr. 196).

The defense also called Officer Julius Cochran. He testified that he responded to 312 6th Street on May 31, 1969, where he met Mr. Kale (Tr. 197). The officer related that Mr. Kale told him he had seen a fight in the house across the street and observed a man striking something while a woman screamed (Tr. 198). The officer went up to the room and observed a man and a woman. He could not remember what the man looked like. The woman was on the bed on her stomach, and he did not observe any blood (Tr. 199–200). On cross-examination he testified that he did not turn the woman over and only went only about three feet into the room (Tr. 201). He further stated that his investigation was conducted about 11:30 p.m. (Tr. 201).

After the testimony of the officer, appellant renewed his motion for judgment of acquittal on the grounds that the jury

would have to speculate that appellant was the individual involved (Tr. 204–205) and that, in any event, appellant as a matter of law was too drunk to be criminally responsible for the offense charged (Tr. 206–207). The motion was denied (Tr. 207). Appellant requested instructions on intoxication and manslaughter (Tr. 208), and further requested an instruction on self-defense (Tr. 213). The court denied appellant's requests for instructions on intoxication and self-defense but granted his request for an instruction on manslaughter (Tr. 218). Following arguments and the charge to the jury, the jury retired and thereafter returned a verdict of guilty of murder in the second degree (Tr. 241).

ARGUMENT

I. The trial court properly denied appellant's motion for judgment of acquittal.

(Tr. 47–48, 51–53, 62–64, 87, 90, 93–96, 102, 108–109, 112–113, 130–134, 144, 156, 159–161, 164–166, 204–207)

Appellant contends that the trial judge erred in denying his motion for judgment of acquittal. However, the record clearly reveals that the evidence, when viewed in the light most favorable to the Government, certainly permitted a reasonable mind fairly to conclude guilt beyond a reasonable doubt, particularly when given the benefit of all legitimate inferences to be drawn. *Crawford* v. *United States,* 126 U.S. App. D.C. 156, 375 F. 2d 332 (1967); *Curley* v. *United States,* 81 U.S. App. D.C. 389, 160 F. 2d 229, cert. denied, 381 U.S. 837 (1947).

The record reveals that on the morning of June 1, 1969, Aletha Jackson was found deceased in a second-floor front bedroom of a home at 312 6th Street, N.W. (Tr. 156). The decedent exhibited external injuries consistent with a beating, and the cause of death was determined to be a broken neck (Tr. 62–64). The room also contained a baseball bat and pieces of a broken banister, all of which bore stains of human blood (Tr. 159–161). The room in which the decedent was found was rented to appellant (Tr. 47–48).

During the afternoon of May 31 appellant threatened the life of the decedent while appellant, the decedent and Mr. and Mrs. McLean were drinking together in the McLean's apartment on the ground floor of the same building (Tr. 87, 90). After appellant departed, the decedent indicated to Mr. McLean that she was going to his apartment (Tr. 102); she thereafter returned to the McLean's with a scar on her face and blood on her dress (Tr. 51–52). She remained at the McLean's a short while and then returned upstairs (Tr. 52). That night both McLeans heard the decedent scream (Tr. 53, 93). Mr. McLean investigated the screams on two occasions. On the first occasion the decedent was on the floor and appellant was walking around the room. On the second occasion the decedent, bleeding from the nose, was on the bed, and appellant was sitting at the top of the stairs outside the room (Tr. 93–96). Mr. Kale observed what appeared to be beatings and heard a woman screaming from his vantage point across the street. The acts occurred several times, stopping only when the police arrived in response to his call (Tr. 108–109, 112–113). Finally, appellant asked his daughter and her boy friend to establish an alibi for him asking the boy friend to dispose of the body of the decedent (Tr. 130–134, 144). The evidence clearly permitted a jury to conclude guilt beyond a reasonable doubt.

Appellant argues that because the evidence against him was circumstantial, the case should not have been submitted for the consideration of the jury. However, the law makes no distinction between direct and circumstantial evidence, nor is there a greater degree of certainty required of circumstantial evidence than of direct evidence. *Holland* v. *United States,* 348 U.S. 121, 139–140 (1954); *Hunt* v. *United States,* 115 U.S. App. D.C. 1, 3, 316 F. 2d 652, 654 (1963). Indeed, in the *Crawford* case itself the evidence was largely, if not entirely, circumstantial, and the factual situation was very similar to that in the case at bar. This Court nevertheless had no difficulty in affirming Crawford's conviction and, in doing so, articulating once again the standard to be applied in assessing the sufficiency of the evidence.

Appellant argues that the Government's case was founded upon an inference on an inference and thus was purely specu-

lative and therefore insufficient. As this Court has stated, however, a case is not speculative merely because inferences are drawn to conclude guilt:

> The rule is not that an inference, no matter how reasonable, is to be rejected if it in turn, depends upon another reasonable inference; rather, the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. *United States* v. *Harris,* D.C. Cir. No. 22,742, decided August 12, 1970, slip op. at 26–27, citing *Devore* v. *United States,* 368 F. 2d 396, 399 (9th Cir. 1966).

In the instant case "[t]he inferences to be drawn from each of the series of facts as outlined . . . and circumstances which were established beyond peradventure, support conviction beyond a reasonable doubt." *Mendoza-Acosta* v. *United States,* —— U.S. App. D.C. ——, ——, 430 F. 2d 516, 519 (1970) (citations omitted).

II. The trial court did not err in giving an *Allen*-type charge in its original instructions to the jury.

(Tr. 238–239)

Appellant urges that the trial court erred in giving an *Allen*-type instruction in its original charge to the jury on the ground that it was coercive. We disagree.

The trial court, in its original instructions to the jury, included an instruction similar to the *Allen* charge.[4] Appellant argues that the use of that instruction was coercive, relying on *United States* v. *Johnson,* D.C. Cir. No. 23,168, decided June 19, 1970. Initially it should be noted that this Court has recently approved of submitting an *Allen*-type charge to the jury, when such a charge is used, prior to the time the jury retires for deliberation. *See United States* v. *Thomas,* D.C. Cir. No. 22,768, decided November 6, 1970. Unlike the instant case, however,

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[4] The instruction was similar to Instruction No. 41, JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (1966).

both *Johnson* and *Thomas* dealt with the issue of coercion as it applies when an *Allen*-type charge or similar expressions are used after the jury has deadlocked. In the absence of an "*Allen*-plus" situation, this Court's decision in *Kent* v. *United States*, 119 U.S. App. D.C. 378, 392, 343 F. 2d 247, 261 (1964), *rev'd on other grounds*, 383 U.S. 541 (1966), requires affirmance. This is particularly true, where, as here, the trial judge carefully circumscribed the charge of the prejudicial variants and coercive statements criticized in various cases.[5]

III. The trial judge did not prejudice appellant by his remarks in sustaining a Government objection.

(Tr. 180)

On direct examination of appellant, the following colloquy ensued:

> Q. When did Mr. McLean tell you that he had been up in your room while you were at the filling station?
>
> Mr. SCHUSTER [the prosecutor]. Objection, your Honor. This is hearsay. Mr. McLean has already testified as to when he was up there.
>
> The COURT. I don't think this helps him any, Mr. Parker [defense counsel]. I will sustain the objection. (Tr. 180).

Appellant, while not objecting at trial, now argues that this remark of the trial court prejudiced appellant in the eyes of the jury. Since no objection was taken at trial, this Court must now find plain error.[6] On this record, we submit, it cannot do so.

The remarks of the trial judge were made in sustaining an objection registered by the Government. It is axiomatic that "[w]ords of the trial judge are not to be isolated for assessment. Nor are specimens of his comments to be wrested out of context and measured against . . . intriguing generalities." *United States* v. *Thayer*, 209 F. 2d 534, 535 (7th Cir. 1954) (citations

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[5] The trial court omitted such potentially coercive language as "it is your duty to decide the case if you can conscientiously do so" and emphasized that "the verdict must be the considered judgment of each juror" (Tr. 238).

[6] FED. R. CRIM. P. 52(b).

omitted). These remarks, placed in their proper context, fall far short of prejudicial error. Nor do they approach the overzealousness and "breach of the atmosphere of judicial evenhandedness that should pervade the courtroom." *United States* v. *Barbour*, 137 U.S. App. D.C. 116, 420 F. 2d 1319, 1321 (1969). In context, the words are innocuous and clearly non-prejudicial.

IV. The trial court properly prevented a witness from giving conclusory testimony.

(Tr. 108–114)

Appellant urges that reversal is mandated by the trial court's failure to prevent a witness from giving conclusory testimony, and that this testimony coupled with the court's statement that the witness was competent to testify to what he observed constituted error. Appellee disagrees.

Reuben Kale testified that he was across the street from the room in which the homicide occurred and that he observed a man in the room beating something with a long object and a woman screaming when the object struck (Tr. 108–110). During his testimony Mr. Kale stated that "he hit her a few more times and then he stopped" (Tr. 110–111). The court immediately interrupted the testimony, *sua sponte,* and elicited from Mr. Kale the fact that he did not actually see the man beating a woman, but that he only observed the man "hitting something or other and somebody was screaming" (Tr. 111). Appellant objected to the conclusory testimony, and the court explained at some length what the testimony was. He concluded that the witness could not testify where "the long object was landing" nor "whether it was an inanimate object being hit," but that the witness was competent to testify to those things he observed (Tr. 111).

On two subsequent occasions the witness again used conclusory terms (Tr. 112). On both occasions the trial judge quickly corrected the errors of the witness (Tr. 112–113). Following the second occurrence, the court again went to great lengths in the presence of the jury to explain exactly what testimony was competent and, in effect, instructed the jury to

disregard any testimony other than the eyewitness observations (Tr. 113). Rather than lending "weight to mere speculation," [7] the court quite properly examined the witness in depth to determine the precision of his testimony.[8] We submit that there was no error in what the court did; on the contrary, the court might well have fallen into error if it had not taken the corrective steps which it took.

V. The jury was properly instructed on the elements of murder in the second degree.

(Tr. 231–233)

Appellant urges for the first time on appeal that the trial court erred in its instruction to the jury on murder in the second degree. Appellant's contention is two-pronged. Initially he claims error in the court's statement that "this needs no further explanation" after defining the first element, and secondly he claims that the court's instruction concerning implied malice permitted the jury improperly to infer that the use of force constituted malice. A review of the record reveals no error.

The trial court in its instructions to the jury stated: "As to the first element, that the defendant inflicted a wound or wounds from which the deceased died, this needs no further explanation." Appellant objects to the latter part of the phrase, contending that it foreclosed from jury consideration the cause of death. The record reveals, however, that the trial court on several occasions reminded the members of the jury of their duty as the triers of fact. The court instructed, *inter alia:* "I do not, of course, tell you how to determine the facts or what you should find the facts to be" (Tr. 224); "[n]othing . . . the Court will say during these instructions should carry with it any suggestion as to how the Court feels this case should be decided" (Tr. 226); "you are not to single out any certain

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[7] Brief for Appellant, p. 20.

[8] "[F]ew rules are better settled . . . than the right of a trial judge to make proper inquiry of any witness when he deems that the end of justice may be served thereby and for the purpose of making the case clear to the jurors." *Griffin* v. *United States*, 83 U.S. App. D.C. 20, 21, 164 F. 2d 903, 904, *cert. denied*, 333 U.S. 857 (1948).

sentence or any individual point or instruction and ignore the others" (Tr. 227); and "the Government must prove [the essential elements] beyond a reasonable doubt" (Tr. 231). Clearly "the jurors were made adequately aware of their exclusive fact finding perogatives" and, even if it were concluded that the additional phrase now challenged is ambiguous, "its ambiguity is cured by its context." *United States* v. *Howard*, D.C. Cir. No. 23,553, decided July 31, 1970, slip op. at 11–12.

Appellant also urges that the instruction on implied malice was erroneous since it allegedly permitted the jury improperly to infer malice from the use of force. His reliance on *Green* v. *United States*, 132 U.S. App. D.C. 98, 405 F. 2d 1368 (1968), is misplaced. In *Green* this Court held that it was error to instruct the jury that "a wrongful act is intentionally done and, therefore, is done with malice," particularly in the absence of such elements as willfulness, excuse and lack of justification. 132 U.S. App. D.C. at 100, 405 F. 2d at 1370.

In the instant case the trial court's instruction [9] was that "[i]mplied malice is such as may be inferred from the circumstances of the killing as for example, where the killing is caused by the intentional use of a fatal force without circumstances serving to justify or mitigate the act" (Tr. 232–233). Not only does this instruction comport with suggestions of this Court, but it has been specifically approved. *Belton* v. *United States*, 127 U.S. App. D.C. 201, 204 n. 6, 382 F. 2d 150, 153 n. 6 (1967).

Additionally, appellant failed to object to either aspect of the instruction on second degree murder as required by Rule 30, FED. R. CRIM. P. At the conclusion of the instruction about which complaint is now made, counsel for appellant indicated that he was "satisfied" (Tr. 237) and failed to object before the jury returned while registering objections to other aspects of the instructions (Tr. 241). This Court has recently stated, "In the absence of objection and under the circumstances of this case we do not find . . . plain error requiring reversal," particularly where the language of which complaint is made "appeared in the context of a careful and thorough exposition of the defini-

[9] SEE JUNIOR BAR SECTION OF D.C. BAR ASS'N CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 83 (1966).

tion of malice which made it plain that willfulness and a lack of justification or excuse were essential elements of such a state of mind." *United States* v. *Green*, — U.S. App. D.C. —, —, 424 F. 2d 912, 913 (1970).[10]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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JOHN A. TERRY,
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[10] Appellant also claims error in the opening statement of the prosecutor. Initially we submit that this Court should not even consider the issue, since appellant's failure to present this Court with a transcript of that opening statement bars any contention here that it tainted his conviction. *T.V.T. Corp.* v. *Basiliko*, 103 U.S. App. D.C. 181, 257, F. 2d 185 (1958). We would also point out that appellant has changed his position from the one that he espoused at trial. He now argues that the prosecutor improperly told the jury that the Government would "show as a *fact* that this woman was beaten to death by the defendant" (Brief for Appellant, p. 21), whereas at trial he stated his objection to the opening statement by indicating that the Government could not "make a statement . . . that *leads* to the fact this woman was beaten to death" (Tr. 44–45) (emphasis added). Certainly that is what the Government subsequently did prove, *i.e.*, a chain of circumstances which led to the conclusion that appellant beat the decedent to death. Nothing is improper about stating the evidence which leads to a conclusion, even where that evidence is circumstantial in whole or in part. Moreover, as the trial court's remarks indicate, the prosecutor made it clear in his opening statement that no eyewitnesses existed to the actual offense (Tr. 45). It is clear from the limited record before the Court that the prosecutor's opening statement quite properly referred to the circumstantial evidence which the Government intended to produce whereby it would establish the guilt of appellant beyond a reasonable doubt.

U.S. GOVERNMENT PRINTING OFFICE: 1970